ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. DWANDARRIUS JAMAR ROBINSON, Appellant.	CR–18–0284–AP Maricopa County Superior Court No. CR2012–138236–001

APPELLEE'S RESPONSE TO BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court consider a comparative analysis between similarly situated jurors that was not raised at trial or by the parties on appeal? If so, does comparative analysis show that the trial court clearly erred in denying Appellant's *Batson* challenge.

2. Did the trial court err when it denied Robinson's *Batson* challenge to the State's peremptory strike of Juror 358?

3. Should this Court should use this case to revise the *Batson* framework as applied in Arizona courts and find that strikes based on negative encounters with law enforcement or having a relationship with someone who has been arrested or convicted of a crime disparately impact minorities and are a per se violation of *Batson*?

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INTRODUCTION

Amicus Curiae Arizona Attorneys for Criminal Justice ("Amicus"), asks this Court to perform a comparative juror analysis and find that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986) when it exercised four peremptory strikes on two African-American jurors, one Native American juror, and one Hispanic juror. Additionally, Amicus urges this Court to use this case as an opportunity to strengthen the *Batson* framework in Arizona in order to protect against disparate impact and implicit bias during jury selection.

The bulk of Amicus' arguments were not raised in the trial court or by the parties in this appeal. This Court has refused to compare similarly situated jurors when a comparison was not argued for during a *Batson* challenge to the trial court, and should refuse to do so here. Amicus' invitation to revise and strengthen the *Batson* framework should be denied in this case because their concerns of disparate impact and implicit bias were not present in Appellant's jury selection process. If this Court shares some of the concerns raised by Amicus, it can address those concerns through its rule-making authority but should not use this case, where there was no disparate impact or other constitutional violation in jury selection, to make changes to the law.

ARGUMENTS

I
AMICUS' ARGUMENTS REGARDING COMPARATIVE ANALYSIS DO NOT ESTABLISH A *BATSON* VIOLATION.

A. *This Court should not consider Amicus' arguments regarding comparative analysis because it was not argued at trial or by the parties on appeal.*

Amicus argues that a comparative juror analysis establishes that the state engaged in purposeful discrimination in exercising its peremptory strikes. This Court should not consider Amicus' argument because Robinson did not argue comparative analysis when challenging the State's use of peremptory strikes at trial and neither party raised the issue of comparative analysis on appeal.

A comparative juror analysis involves an examination of minority jurors who were struck compared with non-minority jurors who were allowed to serve on the jury. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). If the prosecutor's rationale for striking a minority juror applies equally to a retained non-minority juror, this fact can be considered evidence of purposeful discrimination in violation of *Batson*. *Id.* This Court has declined to perform a comparative analysis when it was not raised in the trial court. *State v. Medina*, 232 Ariz. 391, 404-05 ¶¶ 48-49 (2013) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) ("the United States Supreme Court has warned that a

'retrospective comparison or jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial.'"); *see also Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006) (declining to hold that comparative juror analysis is required at the appellate level).

Here, Robinson's trial counsel did not make a comparative-analysis argument in conjunction with the *Batson* challenge. Because Robinson did not make that argument, the trial court had no reason to perform a comparative analysis when addressing the *Batson* challenge. *See Murray v. Schriro*, 745 F.3d 984, 1005 (9th Cir. 2014) (trial courts are not required to perform a comparative analysis *sua sponte*). Consequently, the State never had the opportunity to address any similarities between stricken and non-stricken jurors and offer any distinctions or explain the weight it gave to some factors over others. *Medina*, 232 Ariz. at 405, ¶ 49.

Additionally, Robinson has also not raised a comparative-analysis argument on appeal. Where an issue is not argued by the parties on appeal, "amicus curiae are not permitted to create, extend, or enlarge the issues." *City of Tempe v. Prudential Ins. Co. of America*, 109 Ariz. 429, 432 (1973); *see also State ex. Rel. McDougall v. Strohson* (Cantrell) 190 Ariz. 120 n.1 (1997) ("We do not permit amici to inject new issues into a case on appeal."). For these reasons, this Court should refrain from conducting a comparative analysis

between similarly-situated jurors.

B. *Amicus' comparison of similarly situated jurors fails to establish purposeful discrimination.*

Even if it were appropriate to consider Amicus' comparative analysis argument, the record shows that there was no purposeful discrimination in the prosecutor's strikes and thus no *Batson* violation.

i. Jurors 145 and 64

A comparative analysis between Jurors 145, who is Black and 64, who is white, fails to show discrimination because these jurors were not similarly situated. Comparative analysis isn't useful when the jurors are not similarly situated. *See Mitleider v. Hall*, 391 F.3d 1039, 1049 n. 9 (9th Cir. 2004). Amicus contends both jurors expressed hesitation over imposing a death sentence and, therefore, the State's use of a peremptory strike on Juror 145 but not 64 is evidence of discrimination. This contention fails, however, because the State struck Juror 145 based on his expression of feeling terrified at the thought of imposing a death sentence—a sentiment not shared by Juror 64.

The prosecution stated that it struck Juror 145 due to his comments that the thought of imposing the death penalty terrified him:

> He indicated - - when he was being questioned about the ability to impose the death penalty, he said: It is terrifying for me to consider what we are even talking about.

> That alone was of concern to the State. He did indicate that he did feel the death penalty could be appropriate, but that this decision terrifies him. And that is of great concern to the State.

R.T. 2/08/18 at 126. The record supports the prosecution's concern because Juror 145 stated that the thought of imposing the death penalty was terrifying:

> I don't know if I would include the emotional aspect of it, although it is terrifying to consider what we're talking about, but – the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's the mitigation. So that's what I mean by it could be appropriate.

R.T. 1/30/18 at 47. Therefore, the prosecutor based its strike on Juror 145's feelings of terror, which is more concerning than generalized hesitation over imposing a death sentence.

Juror 64 is not similarly situated because he did not express any feelings of fear or terror at the thought of voting to impose a death sentence. Amicus' assertion that Juror 64 expressed hesitation because he stated he would have to be "emotionally affected" in order to vote to impose the death penalty is based on an incomplete review of the record. Amicus Br. at 6-7. Juror 64 initially stated he would have to be emotionally affected when asked about his feelings on the death penalty:

> It's probably the most harsh punishment you could give anybody and it would have to be really – I don't know the right word, but something that really emotionally affected me to go that way.

R.T. 1/30/18 at 47. When questioned further on this comment Juror 64

confirmed that rather than making a decision based on whether he was "emotionally affected," he would rest his decision on what was presented in court:

> [Prosecutor]: You had indicated that when it comes – something about voting for or against the death penalty. It would have to affect you emotionally.
>
> [Juror 64]: Yes.
>
> [Prosecutor]: Can you maybe explain that a little more to me?
>
> [Juror 64]: That's hard. I would – it would be more – I don't know if "emotional" would be the right word, but I would have to feel it was the right thing to do, and there would be a lot of different things that could happen that could make me come to that point.
>
> [Prosecutor]: And that feeling of whether it's right thing to do or the wrong thing to do, that feeling can only be based on what you hear and see here in the courtroom.
>
> [Juror 64]: Yes
>
> [Prosecutor]: It can't – it can't really come from any other outside sources or –
>
> [Juror 64]: I agree with that.

R.T. 1/30/18 at 70-71.

Juror 145 said that the death penalty could be appropriate, but the thought of imposing a death sentence terrified him. In contrast, Juror 64 agreed that he could base his decision on the evidence presented in court and did not express feelings of terror at the thought of imposing a death sentence.

The difference between these two jurors is stark and they are not similarly situated. A comparative analysis thus fails to show purposeful discrimination.

ii. Jurors 300 and 55

Amicus' attempted comparative analysis of Jurors 300, who is Native American, and 55, who is white, is irrelevant because a peremptory strike was used on *both* jurors. Juror 55 was on the 36-member panel prior to the parties exercising their peremptory strikes, *see* R.O.A. 438 at 4, but he did not make the final panel, R.T. 2/08/18 at 132, 134. Comparative analysis is only applicable when the State's rationale for striking a minority juror is equally applicable to a non-minority juror who served on the jury. *Miller-El*, 545 U.S. at 241. Because Juror 55 did not serve on Appellant's jury, a comparative analysis with Juror 300 is irrelevant.

iii. Jurors 358 and 246

Finally, Amicus contends that the fact the State struck Juror 358, but not 246, is evidence of discrimination. Amicus Br. at 24. This argument fails because these jurors' histories with law enforcement show they are not similarly situated. The State was reasonable to have concerns about Juror 358's ability to remain unbiased considering her negative encounter with law enforcement.

In the juror questionnaires, both Jurors 358 and 246 indicated that they

had negative encounters with law enforcement. Juror 358 described her experience in writing: "Racial profiling by cops pulling over the car assuming we did not own it or live in my area." R.O.A. 653, Juror 358 Questionnaire, Question 67, at 19-20. Juror 246, who had worked as a police officer, wrote: "Acused [sic] of Evading by a police officer. Never saw him."

Juror 246 was questioned individually by the court and attorneys during voir dire.[1] The prosecutor began by asking Juror 246 about his experiences working as a police officer:

> [Prosecutor]: Now any good/bad experiences with being a police officer? I mean do you –
>
> [Juror 246]: I have had experiences both good with police officers and bad with police officers. There are those that I ran into in that year that we used to call badge happy, that want to be – you know, they're there for the glory, or whatever. Most of them, I believe, are honest, good men and women that are striving to work with their communities.
>
> Have I ever been falsely accused by a police officer? Yes. It's also in there where I was accused of evading, which then was the one thing to which I have pled guilty in my life, which would settle out as a failure to heed a public officer –

R.T. 2/08/2018 at 15-16. Juror 246 continued to discuss the details of the incident leading to what he called a false accusation. *Id*. at 16-18. The prosecutor then asked Juror 246 if he had any good experiences with law

enforcement, to which the juror responded: "Absolutely. I think 99 and 9/10 percent of them are honest, good people." *Id*. at 18.

Jurors 246 and 358 are not similarly situated despite both having a negative experience with law enforcement. Despite having had one negative interaction with an officer, Juror 246 also had worked as a police officer and believed the overwhelming majority of police officers were good and honest people. These comments would alleviate any concern that Juror 246 might have a bias against law-enforcement witnesses. Juror 358, on the other hand, did not have previous experience working as a police officer and did not have any comments to alleviate the concern of possible bias. The State had reason to be concerned about Juror 358's ability to remain unbiased and was justified in striking her. *See Miller-El*, 545 U.S. at 292-93 ("The very purpose of a peremptory strike is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias."). Because a comparative analysis supports the State's peremptory strike, the trial court did not clearly err in denying the *Batson* challenge.

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[1] R.T. 2/08/18 at 4.

II

THE STATE'S PEREMPTORY STRIKE OF JUROR 358 WAS JUSTIFIED ON RACE-NEUTRAL GROUNDS.

The trial court correctly found that the State's rationale for striking Juror 358 was race neutral. The State provided three reasons for its strike: (1) Juror 358 stated she was treated unfairly by law enforcement during a traffic stop; (2) she stated she must be presented with DNA evidence, eyewitness testimony, or video evidence to reach a guilty verdict; and (3) the juror has a history of anxiety attacks. R.T. 2/08/18 at 126-27. Amicus argues that the trial court erred because the prosecution mischaracterized Juror 358's statements. This issue was fully briefed by the parties[2] and fails to establish that the trial court erred in denying the *Batson* challenge.

Amicus urges that the prosecutor mischaracterized Juror 358's responses and therefore proves purposeful discrimination. Amicus Br. at 15. This argument fails because even if the prosecutor had mischaracterized the juror's statements, a mischaracterization standing alone does not establish racial discrimination. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019) (recognizing that prosecutors make mistakes during the hurried nature of a *Batson* hearing and a mistaken explanation does not equate to racial discrimination).

Amicus argues the prosecution mischaracterized Juror 358's statements by stating that she needed DNA, eyewitness testimony, or video evidence when in fact she answered that she did not need these types of evidence to convict. Amicus at 15-16. While Juror 358 did mark "No" when asked if she needed scientific evidence, eyewitness testimony or a confession to convict, she also commented that these forms of evidence "would help prove the case" and could "change her view" when determining whether the State has met its burden. R.O.A. 653, Juror 358 Questionnaire, Questions 52 and 53, at 16-17. These comments raised concerns for the State because it had a circumstantial case with no eyewitnesses and DNA evidence that was "hit or miss." R.T. 2/08/18 at 126-27. Consequently, the State's strike of Juror 358 was based on race neutral grounds and supported by her comments on the types of evidence presented at trial. *See* State's Answering Br. at 29-30 (citing *Kirkland v. State*, 726 S.E.2d 644, 649 (2012)). Even if the State's explanation mischaracterized some of Juror 358's responses, it fails to establish purposeful discrimination. Thus, this argument fails.

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[2] S*ee* Opening Br. at 59; Answering Br. at 27-30.

III

THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO CHANGE THE LAW AS IT RELATES TO DISCRIMINATION DURING JURY SELECTION.

For the reasons argued in the answering brief and briefly discussed in this responsive brief, Robinson should not prevail on his *Batson* claim. As a result, Amicus invites this Court to change the law[3] based on the contention that peremptory strikes based on a juror's negative experience with law enforcement or relationship with someone who has been stopped, arrested, or convicted of a crime, disparately impact minority jurors. Amicus Br. at 16-29. These arguments should be rejected because they were not raised at trial or by the parties on appeal, and Amicus is not permitted to create new issues not addressed by the parties. *Prudential Ins. Co.*, 109 Ariz. at 432. Moreover, the

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[3] Amicus points out that this Court has not "addressed whether the 'impartial jury' right within the Arizona Constitution includes protection against forms of discrimination that result in disparate impact against protected groups" and urges this Court to "revise and strengthen the procedures that Arizona courts must follow under *Batson*." (Amicus Br. at 18.) The impartial jury right in article II, § 24 of the Arizona Constitution is similar to the Sixth Amendment of the United States Constitution. The impartial jury right in the Sixth Amendment guarantees a fair cross section of the community in the original venire, but does not protect against racially motivated peremptory challenges. *See Holland v. Illinois*, 493 U.S. 474 (1990). Because Amicus' brief focuses on *Batson* and disparate impact, Respondents will assume this is an equal-protection analysis consistent with *Batson* and its progeny. *See Hernandez v. New York*, 500 U.S. 352 (1991) (reviewing disparate impact under the Equal Protection Clause of the Fourteenth Amendment).

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statistical data relied on by Amicus is not part of the record in this case and this Court's review is limited to the record that was before the trial court. *GM Development Corp. v. Community American Mortg. Corp.*, 165 Ariz. 1, 4 (Ct. App. 1990). But, perhaps more importantly, this is not the right case for this Court to change the law regarding *Batson* in Arizona and should decline the invitation.

A. This case lacks factual support for a claim of disparate impact.

The record in this case does not support Amicus' disparate-impact arguments. Juror 358 was the sole minority juror who experienced a negative encounter with law enforcement. The State's use of a single peremptory strike on a single minority juror, while three other minority jurors[4] served on the jury, fails to demonstrate an equal protection violation based on disparate impact. *See Hernandez v. New York*, 500 U.S. 352, 359–62 (1991). Therefore, this case undermines Amicus' concern that striking jurors based on negative encounters with police would "cause minorities to be systematically and substantially underrepresented in Arizona juries." Amicus Br. at 24.

This record also lacks evidence of a disparate impact on minority jurors who have been, or know someone who has been, arrested, convicted of a

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[4] Defense counsel struck one minority juror. R.T. 02/08/18 at 124.

crime, or spent time in prison. Juror 300 was the only juror struck, in part,[5] on this basis. R.T. 2/08/18 at 125. Amicus' assertion that Juror 260 was stricken on this basis is incorrect. The State's peremptory strike of Juror 260 was because he "indicated that he was writing letters [to inmates] through a letter program, sharing the gospel with individuals in church[]" and stated that it was his "mission to give inmates uplift, to say hello, to share the message of the gospel and the messages they might like." *Id*. at 127-28. The distinction is important. The State's strike was based on the juror's decision to *voluntarily* communicate with inmates for their betterment,[6] not because he simply had a relationship with someone convicted of a crime. These actions justified a concern that Juror 260 could sympathize with the defendant and fail to remain unbiased. The State's peremptory strike of one out of eight minority jurors does not establish disparate treatment, and it also undermines Amicus' contention that these strikes "serve[] to systematically exclude minority jurors and prejudice minority defendants." Amicus Br. at 28.

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[5] The State also stated it struck Juror 300 because she believed "we are all ingrained to do morally good, even in the worst conditions[,]" and she also said it would be difficult for her to view photographs or impose the death penalty. R.T. 2/8/18 at 125.

[6] The State also based its strike on the fact Juror 260 once felt the laws in Arizona were too harsh, expressed confusion on the burden of proof, and

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Finding a disparate impact in this case would also be inappropriate because it was not addressed in the trial court. A total of 26 of the 36-member panel answered "Yes" to either question 40 or 41, indicating they have been, or know someone who has been arrested, convicted of a crime, or spent time in prison. But because trial counsel never argued disparate impact, there is no record of whether the State challenged any non-minority jurors on that basis. Therefore, the record in this case does not demonstrate that minority jurors were disparately impacted by the State's use of peremptory strikes.

Aside from having no factual support in the record, there is no legal support for Amicus' recommended changes. Amicus advocates for this Court to find that peremptory strikes based on negative encounters with law enforcement and having a relationship with someone arrested or convicted of a crime are a *per se* constitutional violation due to the disparate impact on minority jurors. Arguments for *per se* constitutional violations have been rejected by the Supreme Court and other state courts. *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (declining to find that the exclusion of bilingual jurors was a *per se* violation of the Equal Protection Clause); *see also State v. Holmes*, 221 A.3d 407, 423-24 (2019) (rejecting the argument that distrust of

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because he had problems with people sentenced to the death penalty who are later exonerated. R.T. 2/08/18 at 128.

police is not a race neutral reason due to its disparate impact on minority jurors). This case lacks the factual and legal foundation to support major changes to the *Batson* framework as it is applied in Arizona.

Finally, not only is this case an inappropriate vehicle to effectuate changes in the law as it relates to jury selection, such a change is also unnecessary. This Court has established the Task Force on Jury Data Collection, Practices, and Procedures in Administrative Order No. 2021-35. The Task Force was created to explore several areas related to jury service in Arizona and make recommendations, including "[w]hether peremptory challenges of jurors systemically reduce the representation of minorities and whether changes to the peremptory challenge rules should be made." (https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-35.pdf?ver=2021-03-10-130444-153 (last visited June 28, 2021)). If this Court finds support for the concerns raised by Amicus, it should address those concerns through its rule-making authority, s*ee* Ariz. Const. art. VI, § 5, and not in a case such as this where there is no evidence of disparate impact or implicit bias.

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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